IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 553 of 1997

For Approval and Signature:

HONOURABLE MR.JUSTICE A.L.DAVE
and
HONOURABLE MR.JUSTICE S.R.BRAHMBHATT

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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MOHANSING MISHRUSING - Appellant
Versus
STATE OF GUJARAT - RESPONDENT

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Appearance :
MR BS SUPEHIA for Appellant :
MR AJ DESAI ADDL PP for Respondent :
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CORAM : HONOURABLE MR.JUSTICE A.L.DAVE
and
HONOURABLE MR.JUSTICE S.R.BRAHMBHATT

Date : 30/03/2006

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE A.L.DAVE)

1. The present appeal arises out of judgment and order rendered by the learned Additional Sessions Judge, Ahmedabad (Rural) on 15th May, 1997 in Sessions Case No. 27 of 1995.

2. The appellant was tried by the Sessions Court for offences punishable under Sections 302, 307 and 324 of the Indian Penal Code and Section 135 of the Bombay Police Act. The appellant came to be convicted for the offences punishable under Sections 302 and 307 of the IPC. For the offence punishable under Section 302, he was awarded R.I. for life and was ordered to pay fine of Rs.10,000/-, in default of payment of which, he was ordered to undergo S.I. for two years. For the offence under Section 307, the appellant was awarded R.I. for 10 years and was ordered to pay fine of Rs.5,000/- and in default of payment of which, he was ordered to undergo S.I. for one year. The Sessions Court also directed that if the fine is paid, an amount of Rs.8500/- be paid to the widow of the deceased by way of compensation. Aggrieved by the said judgment and order, the appellant has preferred present appeal, which came to be admitted by this Court on 27th February, 1998 and the appellant was refused bail.

3. The case against the appellant in brief was that he was

staying in the outskirts of village Kundal along with Gisasing Ratansing Marvadi and his family, comprising of his wife Gomiben and his son Prakash and daughter-in-law Geetaben. Gisasing was engaged in the business of digging well and the appellant was working with him.

3.1 On 18th September, 1994, Prakash Gisasing lodged a FIR with Bhavnagar “A” Division Police Station, alleging that around 1 hour on that day, while he was sleeping in his hut with his wife, he heard a commotion from the hut, where his father and mother were sleeping. Therefore, he and his wife rushed to the place and saw the appellant hitting his parents with an axe. According to Prakash, he intervened and therefore, the appellant inflicted a blow on him as well and while attempting to defend the blow, Prakash sustained injury on his left palm near the thumb. According to Prakash, in the meantime, neighbouring persons including Bachubhai Jivabhai rushed to the spot. At that time, the appellant fled away from the place taking Geetaben with him by gagging her mouth. The first informant's parents were found to be unconscious and therefore, were taken to Barvala Hospital in a tempo with the help of village people. From Barvala, a taxi was hired and

injured persons were taken to hospital at Bhavnagar and were admitted in the hospital. The first informant was also given treatment. Prakash, therefore, lodged an FIR around 16-00 hrs. on that day and in the FIR, it is disclosed that the appellant wanted to entice away Geetaben, for which, Geetaben was not ready and therefore, the appellant after causing injuries to Gisasing and Gomiben with an intention to cause their death, took away Geetaben.

3.2 On the basis of the first information, offence was registered and investigation was started. Having found sufficient material against the appellant/ accused, chargesheet was filed by the police in the Court of learned Judicial Magistrate First Class, Dhandhuka. Since the offences alleged against the appellant were triable exclusively by the Court of Sessions, learned Judicial Magistrate First Class, Dhandhuka, committed the case to the Court of Sessions, Ahmedabad (Rural). Learned Additional Sessions Judge, on the matter becoming ripe, framed charges against the appellant/accused on 26th March, 1996 vide Ex.2 in respect of the offences punishable under Sections 302, 307 and 324 of IPC and Section 135 of the Bombay Police

Act.

3.3 The appellant accused pleaded not guilty to the charge and expressed his desire to face the trial. Upon his request, a defence lawyer was provided at the cost of the State.

3.4 The prosecution led the evidence and statement of the accused appellant under Section 313 of the Criminal Procedure Code was recorded on 3rd April, 1997.

3.5 The Sessions Court, ultimately by the judgment and order impugned, found that the prosecution was successful in proving the charges against the appellant accused for offences punishable under Sections 302 and 307 of the IPC and convicted him for the same and punishment was awarded as stated in the earlier part of this judgment after hearing the appellant on the question of quantum of punishment. It is against this judgment and order that present appeal is preferred.

4. Learned Advocate Mr. Supehia appearing for the appellant has taken us through the record and proceedings of the case. He submitted that the trial

Court has committed an error in appreciating the evidence. According to him, this is a clear case of false implication of the appellant. He submitted that the witnesses, who are supporting the prosecution case, are not giving correct details or facts, as can be seen from the evidence. He submitted that the eye-witnesses to the incident, namely Prakash and Gomiben, have improved their versions and therefore, their evidence ought to have been treated as unreliable. According to Mr. Supehia, both these witnesses are interested witnesses. Mr. Supehia submitted that although, according to first informant-Prakash, Bachubhai Jivabhai had come to the spot and had seen the incident, Bachubhai Jivabhai in his deposition Ex. 22, did not support this version of Prakash. Prakash, therefore, improved his case only to implicate the appellant. This aspect has not been properly appreciated by the trial Court.

4.1 Mr. Supehia submitted that the investigation is not carried out in the right direction and that the investigation cannot be considered as impartial and would therefore vitiate the prosecution case.

4.2 Mr. Supehia submitted that it has come on record that as per the earlier version given by Gomiben before the police, Gisasing himself was making advances towards Geetaben and on being told about this, Gomiben and Prakash had scolded Gisasing about this but he did not show any improvement. Mr. Supehia submitted that possibility of Prakash himself having murdered Gisasing, therefore, cannot be ruled out. The story of the prosecution is not, therefore, free from reasonable doubt and, therefore also, the benefit of doubt ought to have been given to the appellant.

4.3. Mr. Supehia submitted that trial Court has not appreciated the above referred aspects and has erroneously recorded conviction. This appeal, therefore, may be allowed, conviction may be set aside and the appellant may be acquitted.

5. Learned Addl.P.P. Mr. A.J. Desai has opposed this appeal. According to him, there are two injured eye-witnesses and there is no reason to disbelieve them. These witnesses have no reason to falsely implicate the appellant and let go the culprit. The presence of these witnesses is very natural and, therefore, their version

on oath, has rightly been accepted. Mr. Desai submitted that nothing emerges in cross-examination of these witnesses to shake the evidence of these witnesses. Mr. Desai submitted further that the story of Prakash having murdered the deceased is coming up for the first time before this Court. No such defence was taken nor was such suggestion made during trial and the same, therefore, may not be accepted.

5.1 Mr. Desai submitted that discrepancy or variance indicated in the deposition of Gomiben has no direct relevance with the incident and the two cannot be connected in absence of defence raising such a plea before the trial Court. So far as deposition of first informant Prakash is concerned, Mr. Desai submitted that there is no discrepancy at all because Prakash in his first information or in his deposition, does not say that incident was witnessed by Bachubhai Jivabhai. All that, he says is that Bachubhai Jivabhai reached there immediately after the incident and that is the exact fact, which Bachubhai himself says in his deposition and therefore, there is no discrepancy in deposition of Prakash.

5.2 Mr. Desai submitted that the conduct of the appellant after the incident is remarkable. Mr. Desai submitted that after the incident, the appellant ran away from the spot taking away the first informant's wife Geetaben. He had no reason to do so if, in fact, his relation with Geetaben were good or in fact he was not involved in the incident.

5.3 Mr. Desai, lastly submitted that in addition to the depositions of eye-witnesses, there are circumstances like discovery of blood stained weapon, used in commission of the crime, by the appellant in presence of Panch witnesses is significant. Mr. Desai submitted that the trial Court has examined all these aspects, and thereafter, has recorded conviction. This court, therefore, may not interfere with the judgment and order impugned in this appeal and the appeal may be dismissed.

6. This Court has taken into consideration rival side cases and has given the record and proceedings a close scrutiny from the angle canvassed by both the sides.

7.From the record, we find that the prosecution has examined following witnesses :-

(i)PW-1 Dr. Sanjay Jayvantsinh, Medical Officer, Ex. 6.

(ii)PW-2 Prakash Gisaji, Complainant, Ex. 8

(iii)PW-3 Gomiben Gisaji, Injured witness, Ex. 10.

(iv)PW-4 Ghanshyambhai Maganbhai Parmar, Panch of discovery panchnama, Ex. 17.

(v)PW-5 Gajubhai Amrabhai, Panch of place of incident, Ex.20.

(vi)PW-6 Bachubhai Jivabhai, Witness, Ex. 22.

(vii)PW-7 Dr. Dinesh Harjibhai Gohel, Medical Officer, Ex. 23.

(viii)PW-8 Geetaben Prakashchandra, Witness, Ex. 26.

(ix)PW-9 Natwarbhai Becharbhai, Investigating Officer, Ex.27.

(x)PW-10 Anopsinh Ramsinh, Investigating Officer, Ex.30.

(xi)PW-11 Tribhovandas Kuberdas, Investigating Officer, Ex.31.

(xii)PW-12 Ramchandrasinh Bahadursinh, Investigating Officer, Ex. 32,

(xiii)PW-13 Khodubha Gumansinh, Investigating Officer, Ex.33,

(xiv)PW-14 Bhavsinh Chhaganbhai, Police Station

Officer, Ex.36.

8.We have also found that prosecution has relied on the following documentary evidence:-

(i) First Information Report of Prakash Ex. 9

(ii) Panchnama of site/place of offence, Ex. 11

(iii) Panchnama of Cloth, Ex. 21.

(iv) Inquest Panchnama, Ex. 12.

(v) Panchnama of body condition of the accused, Ex.13.

(vi) panchnama of the weapon, Ex. 18.

(vii)Post Mortem Notes, Ex. 7.

(viii) Map of the scene of offense with forwarding letter, Ex. 19,

(ix) Ravangi Nodh, Ex. 28,

(x) Receipt of FSL, Ex. 14,

(xi) FSL letter & Biological report, Ex. 15.

(xii) letter, Ex. 16.

9.It is clear that the incident has occurred in vee hours of 18th September, 1994. There is no dispute about the fact that the deceased and his wife Gomiben were occupying one hut, his son Prakash and his wife Geetaben were occupying another hut and the appellant was occupying the third hut located near each other in the outskirts of village Kundal.

9.1 First Informant Prakash at Ex. 8 has stated in his deposition that the incident occurred on 18th September, 1994 around 1-00 O'clock at night. He says that he and his wife were sleeping in their hut. He says that at around 1-00 O'clock in the night, he heard a commotion. He therefore, rushed to the hut, where his parents were sleeping. He saw that the appellant Mohansing was assaulting his parents with an axe. He, therefore, intervened and he was assaulted by the appellant with the axe and while defending himself, he sustained injury on his left thumb. The injuries to his father were just below the left ear. He says that on hearing the commotion, Bachubhai Jivabhai came there rushing. At that time, the appellant Mohansing, fled away from the place taking with him his (first informant's) wife Geetaben by gagging her mouth. He says that he took his parents to Barvala hospital. As no one was available there, he took them to Bhavnagar Government Hospital in a taxi. Both of them were unconscious. The reason behind the incident was that the appellant wanted to have illicit relations with his (first informant's) wife, namely Geetaben, and was, therefore, scolded by the first informant's parents and in retaliation thereto, the appellant had assaulted the

first informant's parents. He says that he had lodged the FIR. He identifies the axe used in the incident by the appellant. He also identifies the shirt worn by his father at the time of incident.

9.2 This witness has been cross-examined at length. The cross-examination is mainly focused on the aspect of relationship between the appellant and Geetaben, on a question, whether it was a relationship of brother and sister or an illicit relationship. Suggestion is made to the witness that he has stated in his first information that his own father (deceased – Gisaji) had an eye on Geetaben, as told to him by his wife, which he denies. He also denies to have stated before the police that his father Gisaji had forcibly taken his wife Geetaben into the hut.

9.2.1 He says that when the incident occurred, Geetaben was with him. However, in cross itself, he says that when he went to the hut of his father, he had gone alone. He denies the suggestion regarding appellant Mohansing being not present at the place of incident. He also denies the suggestion that his father had made some advances towards his wife, that he could not tolerate it and that therefore, he assaulted the deceased as a result of which, he expired. He denies

the suggestion that first information was given by Jivabhai.

9.3 Thus, from this deposition, what emerges is that the appellant caused injuries to the parents of witness-Prakash with an axe and also caused injuries on the left thumb of the said witness. It is also stated that the appellant had taken away the witness's wife-Geetaben, which part is not even challenged in the cross-examination.

10. Witness Gomiben is examined at Ex. 10. She says that she and her husband were sleeping outside the hut. Prakash and his wife Geeta were sleeping in their hut and in the late hours of night, the appellant had come there with an axe and inflicted blow on head of the deceased near left ear and jaw. She says that she was awakened and therefore, the appellant caused injury to her on her left ear. Because of the shouts raised, Prakash came there rushing. She says that because of the axe blow, she became unconscious and when she regained her consciousness, she was in Biyavar Hospital. She regained her consciousness after 25 days. She identifies the weapon used in the incident by the appellant. She identifies her own cloths and she says that she had seen the incident from a close quarter.

10.1 She was also cross-examined at length. Her cross-examination spins around the question whether she had stated in her statement to the police about Geetaben having complained to Prakash about the deceased eying her and then, the witness and her son Prakash trying to persuade the deceased not to do so. These suggestions are denied by her and she sticks to her statement. She states that she has not specifically stated that the appellant had given blow on the deceased on the left ear and jaw. She, however, states that she had stated that injury was caused on face. She also states that she has not stated that injury was caused on left ear of her husband's head but it was stated that injury was caused on face and temple.

10.2 It is found from the deposition of this witness that she specifically implicates the appellant which has not been challenged by the defence.

11. Another important witness is Geetaben. She is examined at Ex. 26. She says that at the time of the incident, they were staying in a field. One hut was occupied by her and her husband and her parents-in-law were staying in another hut. One Mohansing i.e. the appellant was

staying with them in a hut nearby the hut of the parents-in-law. She says that at the time of incident she had gone to attend the nature's call and when she came back, the appellant Mohansinh told her that he would leave her at her parents house. At that time, she had not seen her parents-in-law and she left with Mohansing for her parents place. The appellant took her in a train to her father's place and she does not know where he went thereafter. She says that for purchasing railway tickets, Mohansing had sold off her anklets. She says that in her presence, the appellant told her father that he had murdered Gita's father-in-law and Geeta was brought over there. She says that her father, thereafter, handed over Mohansing – the appellant to Javaja Police Station. She does not know, what happened thereafter.

11.1 In cross-examination, she admits that she has not stated before the police that Mohansing had told in her presence that he had murdered Geeta's father-in-law.

11.2 What emerges from this deposition is that she does not say anything about the incident but she admits that she was taken to her father's place by Mohansing. She states that the appellant stated before her father

that he had murdered Geeta's father-in-law and therefore, her father has handed over the appellant to the police. In cross-examination, she admits that she has not stated this fact before the Police.

11.2.1 This aspect has to be viewed in light of the fact that undisputedly, the appellant was handed over by Geeta's father to Rajasthan police and, in turn, was handed over to Gujarat Police. There is no dispute that if Geetaben or the accused had not stated anything to the father of Geetaben, there was no need for Geetaben's father to hand over the appellant to Rajasthan Police and therefore, the fact about the appellant making extra judicial confession not finding place in her statement before the police, cannot be taken as a factor to render the prosecution case doubtful or to render her deposition doubtful by treating it as improvement in version. This is a bonafide omission on the part of the witness while making statement before police rather than making an improvement in her statement while deposing before the Court. Be that as it may. Apart from this aspect, there are other circumstances, which would lead to implicate the appellant with the offense.

12.The incident took place at one hour in the night. The place of incident is a field in the outskirts of village Kundal. The incident took place at a place in the vicinity of the place of residence of the first informant and his wife. First informant's mother Gomiben, who happens to be the widow of the deceased was staying with the deceased and therefore, presence of Prakash and Gomiben so also Geetaben is very natural. By no stretch of imagination, they can be considered as chance witnesses. The deposition of Prakash cannot be discarded on the ground that he is son of the deceased. He sees the incident occurring. He intervened and he himself is injured. He takes his parents to the hospital, gets them treated and also gets himself treated at the hospital. There itself he lodges the FIR, where, he implicates the appellant. The cross-examination of this witness, though made at length, brings on record nothing, which would shake the faith of the Court in his deposition. Suggestions made and denied by the witness are to the effect that the deceased himself had made some advances towards Geetaben, which resulted into the incident and that the first informant himself caused injury to his father. In absence of any other material, mere

suggestions, which are firmly denied, cannot help the defence. There is no reason to disbelieve the witnesses. Mere fact that the witnesses are relatives and are therefore interested is not sufficient to discard their evidence. Their presence at the place of incident and at the time of incident is natureal. It is unreasonable to expect independent evidence considering the time and place of incident. The evidence has remained unshaken and is therefore, found to be trustworthy. The said cannot be disbelieved on account of some discrepancy as regards motive part emerging in deposition of Gomiben. But the evidence as to incident remains intact so far as it relates to incident. Significance of motive part pales out where there is direct evidence of eye witness to the incident showing involvement of the appellant in the incident as the evidence of eye-witnesses is otherwise found to be worthy of credence.

13.The conduct of the appellant is also relevant. He runs away from the place soon after the incident and takes away Geetaben with him. Whatever his relationship may be with Geetaben, whether of a brother and sister or as alleged by the prosecution witnesses, it would only point at the possibility of the appellant having some

grievance against the deceased, which may point to the motive. Even if it is accepted, the motive part is not properly established. That may not help the appellant when there is strong evidence in the form of deposition of eye-witnesses Prakash and Gomiben.

14.Prakash, neither in his first information report nor in his deposition, says that when the incident occurred, witness Bachubhai Jivabhai was present. All that he says is that Bachubhai Jivabhai arrived there immediately, which aspect is supported by Bachubhai Jivabhai in his deposition Ex. 22, when he says that he was approached by Gangasinh and Prakash and was told that appellant had quarreled and therefore, he went there and saw Gomiben and Gisaji in injured condition. Both of them were unconscious. In the cross examination, this witness admits that he has stated before the police that the cause of quarrel was the deceased rebuking Mohansing (appellant) regarding wife of Prakash. This gives corroboration to the allegation made against the appellant by Prakash.

15.Another important witness Geetaben, wife of Prakash, is examined at Ex. 26. Her deposition is silent about the incident. She could not to have seen the incident.

She only says that she did not see her parents-in-law. The appellant insisted that he would take her to her father's place and she went with the appellant. In this regard, it could be noted that Prakash, in his deposition, during cross-examination, has stated, in terms, that his wife was with him but he had gone there alone. The tenor only indicates that he and his wife were together just before the incident occurred and on hearing the commotion, he alone went to his parent's hut. Obviously, Geetaben could not have seen the incident.

15. Apart from above aspect, assuming that Geetaben had seen the incident and still she does not depose anything about the incident would not abrogate the effect of what is stated by eye-witnesses Prakash and Gomiben.

16. What emerges from the above discussion is that the incident has occurred in presence of witnesses Prakash and Gomiben. They clearly implicate the appellant of having caused serious injuries to the deceased as well as Gomiben, on vital parts of the body.

17. Now coming to the deposition of Dr. Sanjay Sarvaiya at Ex. 6, he had performed the postmortem of the dead

body of deceased Gisaji. He describes the injuries and states that injuries found on the body of the deceased is sufficient in ordinary course of nature to cause death. He also states that injuries were possible with muddamal axe. The witness is cross-examined but nothing specific emerges therefrom so far as number, nature and likely resultant effect of the injuries are concerned or regarding possibility of the injuries not being caused with the muddamal axe.

18.So far as injuries on Gomiben is concerned, Dr. Dinesh Gohil is examined at Ex. 23. He describes the injuries sustained by Gomiben. The injuries are CLW of the size of 3″ X 1″ on the left jaw going deep into the chick. There was another CLW of the size of 3″ X 1″ on the left ear. This witness is cross-examined. He says that the injured had not come with police yadi. He says that he has taken down the history in the case papers. He admits that it was not stated to him as to with whom the quarrel had occurred. He denies the suggestion that injuries were possible out of a scuffle. He opined that the injuries were on vital parts of the body. He also denies that injuries were not sufficient to cause death in ordinary course of nature. Thus, it is clear that the injuries on Gomiben were on vital parts of the

body, were of serious nature and were sufficient in ordinary course of nature to cause death.

19.Thus, from the deposition of Prakash and Gomiben, it is established that the appellant caused fatal injuries to deceased Gisaji and serious injuries to Gomiben. The injuries were sufficient in ordinary course of nature to cause death as per the depositions of Dr. Sanjaybhai and Dr. Dineshbhai and Gisaji succumbed to the injuries, whereas Gomiben fortunately for all, survived.

20.From deposition of P.W. 4 Ghanshyambhai Maganbhai Parmar, Ex. 17, it transpires that the appellant had, in presence of Panch Witness discovered the muddamal axe used in commission of crime. It was stained with human blood of group “A” as can be seen from report of F.S.L., which was of the deceased and injured Gomiben. This is also a circumstance going against the appellant.

21.The appellant was staying in the vicinity. The possibility of appellant having some motive is shown by the prosecution. Apart from that, there is strong evidence of eye-witnesses to connect the accused with offence. His conduct after the incident of going away from the place is also very relevant and therefore, in

our opinion, the trial Court was right in holding that the prosecution was successful in establishing the charges against the appellant for the offences of murder and attempt to murder.

22. The contention raised by Mr. Supehia that at the most the case would fall in exception (1) or (4) of Section 300 of the IPC, cannot be accepted. There is no material to infer either of the two. No suggestion is made in this regard during the trial. This contention is coming up for the first time in this appeal, which is not even possible to infer from the record.

23. We have gone through the judgment of the trial Court and we are in agreement with the reasonings adopted and conclusions arrived at by the learned Additional Sessions Judge. We do not find any reason to interfere with the order of conviction or with the quantum of punishment and we confirm the same. Appeal, therefore, must fail and stands dismissed.

(A.L.DAVE, J.)

(S.R.BRAHMBHATT, J.)

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